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December 30, 2010

Via e-file

La Donna Castanuela
Office of the Chief Clerk - MC 105
Texas Commission on Environmental Quality
12100 Park 35 Circle
Building F, 1st Floor
Austin, TX 78759

Re: SOAH Docket No. 582-10-1868; TCEQ Docket No. 2009-1865-UCR;
*Application of East Cedar Creek Fresh Water Supply District, CCN No. 11682, to
Acquire Facilities and Transfer a Portion of CCN No. 11206 from the City of
Mabank and to Amend its CCN No. 11682, Located in Henderson County*

Dear Ms. Castanuela:

Enclosed for filing is the City of Mabank's Response to Gun Barrel City's Exceptions in connection with the above-referenced matter. A copy is being served on each of the parties.

Should you have questions or need to reach me, please call (512) 472-8021.

Sincerely,



William D. Dugat III

WDD/dfb
Enclosure

cc: Mailing List

00502768

**SOAH DOCKET NO. 582-10-1868
TCEQ DOCKET NO. 2009-1865-UCR**

APPLICATION OF EAST CEDAR	§	BEFORE THE STATE OFFICE
CREEK FRESH WATER SUPPLY	§	
DISTRICT, CERTIFICATE OF	§	
CONVENIENCE AND NECESSITY	§	
(CCN) NO. 11682, TO ACQUIRE	§	OF
FACILITIES AND TRANSFER A	§	
PORTION OF CCN NO. 11206 FROM	§	
THE CITY OF MABANK AND TO	§	
AMEND ITS CCN NO 11682,	§	
LOCATED IN HENDERSON COUNTY	§	ADMINISTRATIVE HEARINGS

CITY OF MABANK’S RESPONSE TO GUN BARREL CITY’S EXCEPTIONS

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

COMES NOW, the City of Mabank (“City” or “Mabank”), co-applicant, and pursuant to 30 Tex. Admin. Code § 80.257, files the following Response to Gun Barrel City’s (“GBC”) Exceptions to the Administrative Law Judge’s (“ALJ”) Proposal for Decision (“PFD”).

GBC’s Exceptions focus on (1) a number of alleged impacts that will result from the proposed transfer; (2) the issue of fire flow as a criteria for granting a CCN; (3) proposed findings of fact relating to the financial capability of the co-applicant East Cedar Creek Fresh Water Supply District (“ECCFWSD” or “District”); and, (4) GBC’s preclusion from serving within its city limits if the application is granted. Mabank responds to each of GBC’s allegations below.

I. ALLEGED IMPACTS OF THE PROPOSED TRANSFER

GBC first complains that transferring Mabank’s 900 customers to ECCFWSD will immediately result in a reduction of service level from 0.53 gallons per minute (“gpm”) to 0.45 gpm per customer and that, until ECCFWSD brings on line its full system capabilities, the level

of service will fall even further to somewhere between 0.234 gpm and 0.308 gpm. GBC's allegations are based upon a misplaced reading of the record and the TCEQ rule relating to the application.

GBC misconstrues the record to conclude that ECCFWSD's Brookshire Water Treatment Plant refurbishment that will bring plant capacity to 3 million gallons per day ("mgd") will not be completed in a timely manner for service by ECCFWSD to the 900 customers being transferred from Mabank. In support of this contention, GBC provides a transcript excerpt. But, GBC omits the portion of the transcript where ECCFWSD's General Manager states that the refurbished plant filters should be on line by the end of this year (2010), which will bring the system up to a 3 mgd capacity and, by 2012, the plant will be at the full capacity of 4 mgd.¹ As the ALJ points out at page 11 of the PFD, a 3.0 mgd plant will serve all the existing ECCFWSD and transferred Mabank customers in compliance with ECCFWSD's TCEQ-approved 0.45 gpm per connection level. What is more (and what GBC fails to point out), Mabank has agreed to provide ECCFWSD 777,600 gallons of water per day² for 180 days after the Mabank customers are transferred, and then 103,680 gallons of water per day for one year.³ With the Mabank water

¹ Transcript page 18 lines 5- 16 provides:

Q: [By Dugat] The Brookshire plant capacity at this point, before the expansion, is what?

A: [By Goheen] I believe I'll have to rely on the engineer on that, but right now, with the two filters down, it's 2 MGD. With the two other filters -- they should be completed this year -- which would be able to transfer into the 3 MGD.

Q: And at some point I heard you say 4 MGD.

A: Yes.

Q: When is that scheduled?

A: If we continue on plans, that should be done by the year 2012.

² 777,600 gallons per day is 0.60 gallon per minute (gpm) for 900 customers (777,600 ÷ 24 hours/day ÷ 60 minutes/hour ÷ 900 customers is 0.60 gpm/connection.)

³ Included as Mabank Exhibit 3 is a Water Sale and Purchase Contract, which provides under paragraph A.1. the following:

Quantity of Wholesale Water. The City will furnish ECCFWSD wholesale water at the points of delivery described below beginning on the Effective Date. The quantity of water furnished by the City shall not exceed 777,600 gallons of water per day at a maximum hourly rate of 81,000 gallons for the first 180 days of the Term of this Contract (the "Reduction Date"), it being acknowledged and agreed by the City and

and the 3.0 mgd plant capacity, ECCFWSD can supply water to its existing and new customers at a level per connection that meets or exceeds the current level of service received by the 900 transferred customers.

GBC mistakenly cites Commission Rule 291.105(a) in criticizing the ALJ for not requiring ECCFWSD to supply a capital improvement plan (“CIP”) with the application showing how ECCFWSD will provide service when system capacities are at 85%. The rule requiring a CIP with the application does not apply to ECCFWSD, which is a *retail public utility*. Instead, Commission Rule 291.105(a) applies to *public utilities and water supply corporations*, neither of which is ECCFWSD.⁴

GBC next asserts that the proposed transfer is not in the public interest because ECCFWSD is non-compliant with TCEQ Rule for Haloacetic Acid (HAA5’s), a disinfection by-product. The criterion under Commission rules governing a CCN transfer relating to this issue is whether conditions of a judicial decree, compliance agreement, or other enforcement order have not been substantially met. 30 TAC § 291.112 (B). There is no dispute that the District is in compliance with the 2006 Enforcement Order. ECCFWSD is working diligently to resolve the HAA5’s noncompliance. District operators and management teams are currently participating in an eighteen month training program. (ECC-1, pg. 10, l. 14-23). Through research and testing,

ECCFWSD that on or before the Reduction Date, ECCFWSD shall reduce the water needs by an amount equal to needs equivalent of 780 meters on the City system. After the Reduction Date, the quantity of water furnished by the City shall not exceed 103,680 gallons of water per day at a maximum hourly rate of 10,800 gallons for a (1) year period. The water furnished under this Contract may only be used by ECCFWSD for resale to the water meter connections and customers transferred by the City to ECCFWSD within the “Transfer Area” identified in Exhibit “A”, attached hereto. ECCFWSD is prohibited from using water supplied under this Contract in any other ECCFWSD service areas without prior consent from the City for emergency purposes.

⁴ The definition of public utility is that definition given to water and sewer utility and a water and sewer utility is “Any person, corporation, cooperative corporation, affected county, or any combination of those persons or entities, *other than* a municipal corporation, water supply or sewer service corporation, or a *political subdivision of the state* . . . “30 TEX. ADMIN. CODE 291.3 (34) and (52). ECCFWSD is a statutorily created municipal utility district, a political subdivision of the state. (ED.-7, pg. 12, l. 5-6), (ECC-1, pg. 10, l. 3).

ECCFWSD has changed its coagulant process. (*Id.* at pg. 11, l. 1-6). ECCFWSD is well on its way to eliminating this common side effect of disinfection.

Finally, under what it misperceives will occur as a result of the transfer, GBC asserts that customers will sustain significant rate increases after ECCFWSD serves the 900 Mabank customers. The only evidence regarding future rates, as explained in the PFD at pages 21-22, shows ECCFWSD's rates are lower than Mabank's. The record shows that if the transfer does not occur, Mabank would be required to make \$8 million dollars in improvements. (Tr. p. 154, l. 15-18). This undoubtedly would result in higher rates and provides support that the transfer should be approved.

II. FIRE FLOW

GBC suggests that the transfer should be denied because ECCFWSD will not provide fire flows. There is no dispute that the Commission's CCN rules do not require fire flow as a criteria for granting a CCN. Instead GBC argues that the ALJ misses the point and that fire flows should be considered under a "public interest" test. GBC's argument is that "public interest" is a broad variety of impacts extending beyond specific statutory factors. GBC relies on the *Texas Citizens for a Safe Future and Clean Water v. Railroad Commission*, 254 S.W.23d 492 (Tex. App.—Austin, 2008), where the court evaluates "public interest" when the term is included in a statute without definition or elaboration. What GBC misses in its assertion and reliance on the *Clean Water* case is that the "public interest" is fleshed out statutorily in Chapter 13 of the Water Code, as well as in the TCEQ's rules governing this application. That is, to address concerns whether a transfer serves the "public interest", Texas Water Code § 13.301(e)(5) specifically requires the

consideration of the factors set forth in Texas Water Code § 13.246(c).⁵ Likewise, TCEQ Rule 30 TAC § 291.109(e)(5) elaborates the factors to consider in determining the public interest.⁶ It is inappropriate in the context of a CCN transfer under § 13.301 to consider “public interest” as extending beyond the factors specifically listed.⁷

⁵ Texas Water Code § 13.301(e)(5) provides that a hearing may be granted *if there are concerns that the transaction may not serve the public interest, after the application of the considerations provided by Section 13.246(c)* for determining whether to grant a CCN. The § 13.246(c) factors are:

- (1) the adequacy of service currently provided to the requested area;
- (2) the need for additional service in the requested area, including whether any landowners, prospective landowners, tenants, or residents have requested service;
- (3) the effect of the granting of a certificate or of an amendment on the recipient of the certificate or amendment, on the landowners in the area, and on any retail public utility of the same kind already serving the proximate area;
- (4) the ability of the applicant to provide adequate service, including meeting the standards of the Commission, taking into consideration the current and projected density and land use of the area;
- (5) the feasibility of obtaining service from an adjacent retail public utility;
- (6) the financial ability of the applicant to pay for the facilities necessary to provide continuous and adequate service and the financial stability of the applicant, including, if applicable, the adequacy of the applicant's debt-equity ratio;
- (7) environmental integrity;
- (8) the probable improvement of service or lowering of cost to consumers in that area resulting from the granting of the certificate or amendment; and
- (9) the effect on the land to be included in the certificated area.

⁶ 30 TAC § 291.109(e)(5) provides that *it is in the public interest to investigate* the following factors:

- (A) whether the seller has failed to comply with a Commission order;
- (B) the adequacy of service currently provided to the area;
- (C) the need for additional service in the requested area;
- (D) the effect of approving the transaction on the utility or water supply or sewer service corporation, the person purchasing or acquiring the water or sewer system, and on any retail public utility of the same kind already serving the proximate area;
- (E) the ability of the person purchasing or acquiring the water or sewer system to provide adequate service;
- (F) the feasibility of obtaining service from an adjacent retail public utility;
- (G) the financial stability of the person purchasing or acquiring the water or sewer system, including, if applicable, the adequacy of the debt-equity ratio of the person purchasing or acquiring the water or sewer system if the transaction is approved;
- (H) the environmental integrity; and
- (I) the probable improvement of service or lowering of cost to consumers in that area resulting from approving the transaction.

⁷ If a broad variety of impacts extending beyond specific statutory factors are to be evaluated, then the CCN should still be transferred to ECCFWSD. Customers within ECCFWSD's jurisdiction can elect the members of the board of directors. Those customers served by Mabank within GBC's city limits have no voice in the selection of Mabank's city council. If these customers were served by GBC, they cannot appeal to TCEQ for rate relief. As customers of ECCFWSD, these residents can appeal a rate decision to TCEQ under Texas Water Code § 13.043(b)(4). If the transfer is approved, GBC residents will obtain water and sewer service from the same retail public utility.

None of the CCN factors include fire flow considerations. Even GBC's witness, Sam Jones, who, in his 25-plus years at TCEQ and its predecessor agencies, had not seen fire flow as a basis to turn down a CCN. (Tr. P. 186). If the Commission were to now provide that fire flow should be considered as a basis for denying a CCN, it is likely that many Commission-issued CCNs would not meet approval if considered under such a standard.

III. FINANCIAL CAPABILITIES

GBC challenges proposed findings of fact ("FOF") 32, 33 and 39. GBC is mincing words concerning FOF 32. Contrary to GBC's argument, the FOF does not state the \$1.475 million Texas Water Development Board loan will be used to upgrade plant capacities. The FOF provides that the loan is to make anticipated improvements to serve the transferred area. The improvements needed to serve the transfer area include the interconnections between Mabank's and ECCFWSD's systems. GBC argues that FOF 33 is irrelevant. FOF 33, which indicates that ECCFWSD has a \$1 million dollar reserve fund, is relevant to ECCFWSD's financial stability, including the ability to provide the necessary capital investment to ensure continuous and adequate service. Water Code § 13.246(c)(6) and 30 TAC §§ 291.109(c)(5)(G) and 291.112(c)(5)(E). Finally, FOF 39 relating to customers' future rates is related to the probable improvement of service or lowering of cost to consumers in that area resulting from approving the transaction. Texas Water Code § 13.246(c)(8) and 30 TAC § 291.109(c)(5)(I).

IV. ACQUISITION PRECLUSION

GBC criticizes the ALJ's treatment of GBC's argument that if ECCFWSD is granted the CCN transfer, GBC will never be able to serve the area because it will be unable to decertify ECCFWSD under Water Code § 13.255 or because ECCFWSD has federal debt. GBC's

argument is a red herring. If the transfer is denied, Mabank will retain the CCN and GBC will be in the same situation it argues against—GBC will be unable to decertify Mabank under Water Code § 13.255. That is, GBC's ability to certificate the transfer area is the same (i.e. nonexistent) regardless of the outcome of this proceeding. GBC's irrelevant argument should be rejected.

WHEREFORE, Mabank respectfully prays that GBC's exceptions be rejected and that the PFD and proposed order remain as written by the ALJ.

Respectfully submitted,

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By:


William D. Dugat III
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ATTORNEYS FOR CITY OF MABANK

CERTIFICATE OF SERVICE

By my signature below, I hereby certify that on this 30th day of December, 2010, a true and complete copy of the foregoing was sent to the following by facsimile, overnight delivery, or by first class mail:

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